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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 27 2007
SRC 06 276 50988

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Laura Dzadnick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail clothing apparel company. It seeks to employ the beneficiary permanently in the United States as a senior computer systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education required for the classification sought. Specifically, the director determined that the beneficiary did not possess a foreign equivalent degree to a U.S. baccalaureate.

On appeal, counsel correctly notes a minor error by the director in listing the primary job requirements as set forth on the alien employment certification and asserts that the director erred in evaluating the beneficiary's credentials. The supporting authorities on which counsel relies relate to a lesser classification. Ultimately, we uphold the director's decision in this matter.

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the classification sought.[1]

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a foreign three-year bachelor's degree and a certificate from Digital Equipment (India) Limited "for successfully completing a course of instruction in Post Graduate Diploma in Computer Applications." (Grammar as it appears in original.) Thus, the issues are whether either credential is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the credentials in combination.[2]

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[1] *Cf. Hoosier Care, Inc. v. Chertoff*, No. 06-3562 (7th Cir. April 11, 2007) relating to a lesser classification than the one involved in this matter and relying on the regulation at 8 C.F.R. § 204.5(l)(4), a provision that does not relate to the classification sought.

[2] We acknowledge that the Addendum to Part H, Line 14 of the ETA Form 9089 states that the employee may have "any suitable combination of work experience, education and training that is equivalent to the actual minimum requirements of the position and shows demonstrable ability in the required skill set." We do not reach whether the alien is qualified for the job as specified on the ETA Form 9089 or whether the job requires

As noted above, the ETA Form 9089 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> (a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:
>
> > (1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts.

> **There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise.** *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has

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an advanced degree professional pursuant to the regulation at 8 C.F.R. § 204.5(k)(4). Rather, in this decision we decide only whether the alien qualifies as an advanced degree professional.

> the authority to make the two determinations listed in section 212(a)(14) [current section 212(a)(5)].[3] Id. at 423. The necessary result of these two grants of authority is that section 212(a)[(5)] determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)[(5)]. If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). (Bold emphasis added.)

The petitioner submitted an academic evaluation concluding that the beneficiary's three-year degree involved the satisfaction of "substantially similar requirements to the completion of three years of academic studies leading to a Bachelor of Science Degree from an accredited institution of higher education in the United States." The evaluation then concludes that this degree "considered together with the completion of no less than one year of postgraduate academic studies in computer science" is the equivalent of a Bachelor of Science degree in Computer Science from an accredited institution of higher education in the United States.

On appeal, counsel cites 8 C.F.R. § 204.5(l)(3)(ii)(C) relating to professionals (*not* advanced degree professionals) and *Grace Korean United Methodist Church v. Michael Chertoff,* CV 04-1849-PK (D. Ore. November 3, 2005), which held that Citizenship and Immigration Services (CIS) "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent'" when adjudicating a lesser classification than the one sought. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Specifically, we are not required to follow the decision of a United States district court in matters arising out of the same district, but are bound by the published decisions of the United States Circuit Courts of Appeals for matters arising out of the same circuit. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d at 74

[3] As amended by Sec. 601, and as further amended by Sec. 172 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978; however, the changes made by Sec. 162(e)(1) were repealed by Sec. 302(e)(6) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-323, 105 Stat. 1733, effective as though that paragraph had not been enacted.

(administrative agencies are not free to refuse to follow circuit precedent in cases originating within the circuit).

Regardless, *Grace Korean* involved the adjudication of a petition under a lesser classification than the one sought in this matter. Most significantly, the court in *Grace Korean* repeatedly emphasized that the classification sought in that matter included "skilled workers," who by statute do not need a degree. In the matter before us, the petitioner seeks to classify the beneficiary as an advanced degree professional, a classification that *does* require a degree. This distinction was acknowledged by the same district court in *Snapnames.com et al. v. Chertoff,* No. CV 06-65-MO (D. Ore. November 30, 2006). Thus, we do not find *Grace Korean* relevant to this matter.

Also on appeal, counsel submits a new evaluation concluding that the beneficiary's combination of education is equivalent to a U.S. baccalaureate, a report from the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the following three articles: "Does the Value of Your Degree Depend on the Color of Your Skin" by [redacted] and [redacted], "A Review of Indian Education and The Institute of Charted Accountants of India" and "Demand for Community Colleges Tests State Resources." Counsel also submits a new evaluation of the beneficiary's credentials.

The UNESCO report states:

> Member States should take all feasible stops within the framework of their national systems and in conformity with their constitutional, legal and regulatory provisions to encourage the competent authorities concerned to give recognition, as defined in paragraph 1(e), to qualifications in higher education that are awarded in the other Member States, *with a view to enabling their holders to pursue further studies, training or training for research in their institutions of higher education, subject to all academic admission requirements obtaining for nationals of that State.*

(Emphasis added.) Paragraph 1(e) of the report defines recognition as follows:

> "Recognition" of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State an deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the

recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

The record contains no evidence that the article by [redacted] and [redacted] has actually been published in addition to being posted on a website or that it has been adopted by official bodies, such as the American Evaluation Association. The article indicates that an Indian three-year degree "often" involves more than 1800 credit hours and that the Indian system "presupposes that general education (pre-major studies) occur at the Intermediate level." The article includes British colleges that accept three-year degrees for admission to graduate school but concedes that "a number of other universities" would not accept three-year degrees for admission to graduate school. Similarly, the article lists some U.S. universities that accept three-year degrees for admission to graduate school but acknowledges that others do not. In fact, the article concedes:

> None of the members of N.A.C.E.S. who were approached were willing to grant equivalency to a bachelor's degree from a regionally accredited institution in the United States, although we heard anecdotally that one, W.E.S. had been interested in doing so.
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> In this process, we encountered a number of the objections to equivalency that have already been discussed.
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> [redacted], President of Educational Credential Evaluators, Inc., commented thus,
>
> "Contrary to your statement, a degree from a three-year "Bologna Process" bachelor's degree program in Europe will NOT be accepted as a degree by the majority of universities in the Untied States. Similarly, the majority do not accept a bachelor's degree from a three-year program in India or any other country except England. England is a unique situation because of the specialized nature of Form VI."
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> * * *
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> International Education Consultants of Delaware, Inc., raise similar objections to those raised by ECE.,
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> "The Indian educational system, along with that of Canada and some other countries, generally adopted the UK-pattern 3-year degree. But the UK retained the important preliminary A level examinations. These examinations are used for advanced standing credit in the UK; we follow their lead, and use those examinations to constitute the an [sic] additional year of undergraduate study. The combination of these two entities is equivalent to a 4-year US Bachelor's degree."

> The Indian educational system dropped that advanced standing year. You enter a 3-year Indian degree program directly form Year 12 of your education. In the US, there are no degree programs entered from a stage lower than Year 12, and there are no 3-year degree programs. Without the additional advanced standing year, there's no equivalency.

The review of the Indian education system submitted on appeal provides that "Given the nature of the general Indian degree (three years of intensive subject-specific study) with its lack of general education or elective coursework, US Admissions Officers historically do not accept the three-year degrees for admission into graduate programs." Moreover, the review states: "Two Indian three-year degrees are no more 'equivalent' to a U.S. bachelor's than are two Associates degrees in the USA." Regardless, none of the credential evaluations submitted equate the beneficiary's three-year degree to a U.S. baccalaureate.

The review of the Indian education system does consider the completion of a postgraduate diploma. The review states:

> [T]he Post Graduate Diploma *of a university* requires completion of a first degree (BA), BSc or Bcom) to enter and therefore builds on the prior studies, even if the subject is altogether different from the prior degree. Nevertheless, the idea of chronological progression is what causes *many* International Credentials Analysts to consider the first degree PLUS the PG Diploma to be comparable to a US bachelor's. The basic reason is that now the student has a four-year university experience with a capstone achievement, the PG diploma.

(Emphasis added.) The review then explains that several universities have affiliated autonomous colleges that provide instruction but affirms that it is *the university* that issues the PG diploma, listing the autonomous college where the instruction took place. Subsequently, the review states that many U.S. institutions "consider a student with a three-year bachelor's plus a PG approved by AICTE or recognized by a university to have the equivalent of a U.S. bachelor's degree." Digital Equipment issued the beneficiary's Post Graduate Diploma. The record contains no evidence that Digital Equipment is a university or autonomous college or that it is approved by AICTE.

Finally, the article on community colleges discusses the increased enrollment at these institutions but fails to address the issue of the equivalency of Indian degrees and diplomas.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the Circuit Court of Appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d

984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). The Joint Explanatory Statement of the Committee of Conference provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (October 26, 1990). At the time of enactment in 1990, it had been almost thirteen years since *Matter of Shah*. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *Lujan-Armendariz v. INS*, 222 F.3d 728, 748 (9th Cir. 2000) *citing Lorilland v. Pons*, 434 U.S. 575, 580 (1978)(Congress is presumed to be aware of administrative and judicial interpretations).

Counsel's reliance on appeal on the language in the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) relating to professionals is not persuasive. At issue is the regulation at 8 C.F.R. § 204.5(k)(2) defining *advanced* degree. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an advanced degree professional to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an *advanced degree professional* must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 244. Where the analysis of the

beneficiary's credentials relies on work experience alone *or a combination of multiple lesser degrees*, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.[4]

Thus, in order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. As noted in the federal register, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree will qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[4] *Accord Snapnames.com, Inc. et al. v. Chertoff,* No. CV 06-65-MO (D. Ore. November 30, 2006).